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FCC Mail Room

February 25, 2008

FCC
Office of the Secretary
445 12th Street SW
Washington, DC 20554

RE: Applicant Name: Central Islip Union Free School District
USAC Denial of December 27, 2007 (attached); Docket # 02-6

Dear Madame Secretary:

I am counsel to the Central Islip Union Free School District; this Appeal is made from the attached cited denials pertaining to the cited "Funding Request Numbers".

It is requested that the subject Appeals be granted and remanded to the USAC for further consideration especially since only this date was the District able to obtain from CCSI, one of the contractors solicited, its bid/proposal (attached); USAC possesses the successful bid of Network Outsource; finally, attached is correspondence from then Supt. Jerry Jackson to A+ Technology Services indicating that its proposal had been received but that the District had determined that it was going to take a "different course of action for the 2002-2003 school year" (neither the District nor A+ being able to locate the subject bid). Thus, the District did receive some three bids/proposals; accordingly, the basis for the USAC denials has been obviated by way of the District being able to submit that some three proposals were entertained on the matter of the subject Funding Year (2002-03).

Frankly, within the subject period the E-rate program had been existent for only some two years. Thus, there was a lack of familiarity as to the Program's dictates and, therefore, concededly, the formal bidding that may be contemplated under USAC's protocols may not have been strictly observed; however, the District can advise that its intents were proper and that there were several proposals that were considered prior to Network Outsource being designated the E-rate provider.

Also, please consider that, under the laws of the State of New York (including § 103 of the General Municipal Law) competitive bidding would not have been required for the type of services at issue (see attached excerpt of a monograph issued by the New York State Comptroller's Office). Just as professional services provided by attorneys; accountants;

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physicians; *et.al.* are not required to be submitted to competitive bidding so would the providing of E-rate services (requiring special expertise; experience, etc.) not require competitive bidding; although, as noted above there was a clear form of bidding undertaken by the District leading to the awarding of the E-rate contract to Network Outsource.

There was in the spring of 2003 a Board of Education meeting (I was in attendance) devoted to contractors who made presentations relating to their sought designation as an E-rate service provider to the District.

Included within the contractors who made presentations was the ultimate successful candidate Network Outsource; as well as A+ Technology Solutions; CCSI; and a local "mom & pop" firm.

Indeed, it is my recollection that Network Outsource clearly surpassed, qualitatively, the three other contractors who made presentations some five years ago.

Apparently, A+ and Integra Consulting had been serving the District as a consultant and E-rate provider; the District having been advised by the New York State Education Department (Deputy Commissioner Kadamus) that a service provider could not be associated with an E-rate consulting company and, accordingly, the Central Islip UFSD quickly moved to solicit E-rate providers who could, independently, serve the District in conformity with the direction of Deputy Kadamus and, assuredly, USAC's protocols and regulations.

Again, clearly, Network Outsource was the most competent of the presenters that undertook the District's offer of submitting presentations/information to the Board of Education.

Thus, under the ambit of Network Outsource SPIN 143024572 Network Outsource was retained as the E-rate provider/contractor for the 2002-03 Funding Year.

Understandably, within the framework of USAC's audit there was concern on the part of USAC that no documentation was able to be provided memorializing the District's initiative in obtaining proposals; undertaking presentations to the Board of Education; and determining in some kind of evaluatory fashion that Network Outsource was the most viable candidate to provide the subject E-rate services. Again, all I can do is swear that there was a process of reviewing several submissions of proposed vendors; and that, all things considered, Network Outsource prevailed over those contractors making such submissions. The recently obtained proposal from CCSI and the uncovered Supt. Jackson correspondence together with the Network Outsource bid clearly establishes that there was a bidding process that, substantively, served to afford the District the ability to designate Network Outsource as the *bona fide* E-rate provider for the 2002-03 Funding Year.

It is requested that in line with your fairly recent Order (March 28, 2007) in *Adams County*

School District, 14 Commerce City, Colorado, et.al. (FCC 07-35) (attached) that you uphold these appeals in the over-all interests of the intents of the E-rate program; and, specifically the dire need of the Central Islip UFSD (a high tax/low wealth school district within Suffolk County, Long Island, New York) to preserve all budgetary monies possible in lieu of having to undertake the "budget-hit" that a return of \$400,000 to USAC would entail.

The student body of the Central Islip UFSD is exactly the kind of student body that the E-rate program most benefits; a great majority of students are of a minority classification; the great majority of the students qualify for the free-lunch program under the federal program; and, in summary, it is a District that serves a very low socio-economic population.

The District is requesting that there be a waiver of the FCC's rules pertaining to the competitive bidding process to the extent the District did not comport, if it did not comport, with the strict application of said rules; there has been no misuse of funds; in fact, the E-rate services provided to the District and initiated by Network Outsource in the subject period have lead to outstanding strides in the District's capacities to provide a technologically relevant educational experience to its students; a comparison of Network Outsource's charges and fees will find that they compare favorably to those services offered by other competing vendors to similarly sized school districts within Nassau and Suffolk County, Long Island, New York.

The goals of § 254 of the Act are being met in this circumstance; the public interest would be served by way of granting these appeals; the "public interest " would not be served by way of dunning the fiscally strapped Central Islip UFSD the amount of \$400,000.

There can be no showing that there was any attempt by the Central Islip UFSD, its administrators and Board of Education to defraud or abuse the E-rate program.

The subject funds in this matter have been used for the purposes underlying the Act; there have been no service funds improperly disbursed; there have been no service funds that have not been used properly; the integrity of the E-rate program has not been impaired by the Central Islip UFSD; in fact, we would welcome an audit of the "success" of the initiatives undertaken by the Central Islip UFSD by way of the E-rate funding that it has received over the years; and, indeed, specifically, the \$400, 000 that is at issue regarding the Funding Year 2002-2003.

Finally, there would be no good purpose served by way of, at this point, dictating the return of the subject \$400,000 ; such would only lead to necessary restrictions on District programs that serve one of America's most needy School Districts; we are confident that the FCC will, by way of an over-all analysis, agree that the over-all policies and intents of the Act as well as of the USAC and FCC have been upheld; in fact, upheld to the nth degree with regard to the services that have been able to be provided under the outstanding program administered by the FCC and USAC.

Thank you for your considerations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "K. A. Seaman". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Kevin A. Seaman

Attachment

- c. Board of Education
Howard Koenig, Superintendent of Schools
Robert Sniecinski, Consultant, RiverStone Partners, LLC

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Central Islip Union Free School District

Request for Review

Docket No. 02-6

USAC Denial of Central Islip Union Free School District Appeal
Denied on December 27, 2007

Funding Year 2002

Appeal Date February 21, 2008

Appellant Name: Central Islip Union Free School District

Applicant BEN: 123907

FCCRN: 0003500337

Application Numbers: 294809

Funding Request Numbers: 767429, 767431, 767432, 767440, 767444,
767453, 767464, 767466 and 767467.

Service Provider: Network Outsource SPIN 143024572

Summary

The Central Islip Union Free School District received a Notification of Commitment Adjustment Letter from USAC dated February 7, 2007. The letter identifies the FRNs listed above and addresses a commitment adjustment valued at \$413,748.00.

The reason stated by USAC for the adjustment is “ ...During the course of an audit it was determined that the price of the eligible products and services was not the primary factor in the vendor selection process. The applicant could not provide documentation supporting the bids it received or that it carefully evaluated all the bids. Thus, the applicant has failed to demonstrate that they selected a service provider with price being the primary factor and which also meets its needs most cost effectively and efficiently.”

The Central Islip UFSD asserts that there is no basis for the determination that the “price” was not the primary factor; and that the subject funding was in line with the policies and intents behind the Act and that any return of some \$400,000 would be in derogation, under the circumstances, of the Act and the public policy supporting the utilization of E-rate funding to support the technological initiatives provided to school districts and, particularly, an extremely low wealth/high tax district serving a student population and a general populations consisting of, in the great majority, minorities.

The Central Islip UFSD appealed this decision and was denied on December 27, 2007.



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School District (Robert Sniecinski) requesting the documentation associated with the competitive bidding process in 2002-2003. Subsequent phone calls and emails were exchanged, resulting in a third extension to provide the requested documentation by December 10, 2007. No bid documentation was submitted in response. Since the aforementioned documentation has not been provided, USAC can not determine if the Central Islip Union Free District's vendor selection process was in compliance with the Schools and Libraries Support Mechanism competitive bidding rules. Per program rules beneficiaries must retain all documents used during the competitive bidding process. Beneficiaries must retain documents such as: the bids that were received and documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets.

- Since you failed to retain the above specified documentation or produce the above specified documentation upon request of an auditor, USAC rescinded your funding requests. You have failed to provide evidence that USAC erred in its original decision; consequently, the appeal of this COMAD decision is denied.
- FCC rules require that the schools and libraries retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least five years after the last day of service delivered in a particular Funding Year. Any document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism shall be retained as well. See 47 C.F.R. § 54.516(a). The applicants and service providers are further required to produce such records upon a request of any representative (including any auditor) appointed by a state education department, the Administrator, the FCC or any local, state or federal agency with jurisdiction over the entity. See 47 C.F.R. 54.516(b). For further guidance on the FCC's recordkeeping requirements, See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808,15824-15826, paras. 47-50 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Universal Service Administrative Company

Cc: Howard Koenig, Superintendent of Schools
Central Islip Union Free Dist.
50 Wheeler Rd.
Central Islip, NY 11722-2154

CENTRAL ISLIP UNION FREE SCHOOL DISTRICT



JERRY L. JACKSON, Ed. D.
SUPERINTENDENT

FADHILIKA ATIBA-WEZA
ASSISTANT SUPERINTENDENT FOR CURRICULUM AND INSTRUCTION

MICHAEL WOLFERT
ASSISTANT SUPERINTENDENT FOR PERSONNEL

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Post Office Box 9027
Central Islip, New York 11722

April 30, 2003

Mr. David Antar
A+ Technology Solutions, Inc.
4177 Merrick Road
Massapequa, New York 11741

Dear Mr. Antar:

Thank you for your proposal for E-rate services received by us on March 14, 2003. The Board of Education has opted to proceed with a different course of action for the 2002-2003 school year. As a consequence, therefore, we will be filing a change of vendor notice with the Schools and Libraries Division of the Universal Service Administrative Corporation.

We appreciate the time and effort you spent on the preparation of the proposal. Should you have any questions/concerns, please do not hesitate to contact my assistant, Mr. Fadhilika Atiba-Weza at (631) 348-5002.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jerry L. Jackson", written over a horizontal line.

Jerry L. Jackson, Ed.D.
Superintendent of Schools

JLJ:mr

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 - HSS Services
 - Software Support
- **Outsourced Support Agreements**
- **Disaster Recovery Planning**
- **Network Monitoring**

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- Computer Associates
- North Shore-LIJ Health System



Services for Central Islip Pkg1

- Education Evaluation (\$8,000.00)
- Manage IT Support Services (\$96,000.00)
 - Senior Network Engineer
 - Work to create IT Direction with existing staff
 - Strategic Planning / Technology Evaluation
 - Use of our tracking system to automate process
- Network Engineer (\$84,000.00)
 - Network Administrator support
- Hardware Support Resources (\$30,000.00)
 - Sixty days a year (Through Dispatch)
 - On-site hardware support



Services for Central Islip Pkg2

- **Education Evaluation (\$8,000.00)**
- **Manage IT Support Services (\$96,000.00)**
 - Senior Network Engineer
 - Work to create IT Direction with existing staff
 - Strategic Planning / Technology Evaluation
 - Use of our tracking system to automate process
- **Hardware Support Resources (\$30,000.00)**
 - Sixty days a year (Through Dispatch)
 - On-site hardware support



Services for Central Islip Pkg3

- Education Evaluation (\$8,000.00)
- Manage IT Support Services (\$96,000.00)
 - Senior Network Engineer
 - Strategic Planning / Technology Evaluation
 - Work to create IT Direction with existing staff
 - Use of our tracking system to automate process

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- Working relationship with local Cisco resources.
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- **East Hampton Union Free School District**
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contracts under terms which are fair and reasonable (Blank v Browne, 217 App Div 624, 316 NYS 664). In order to assure that political subdivisions properly fulfill this duty, competition should be sought through use of requests for proposals or other method of solicitation (1988 Opns St Comp No. 88-60, p 119).

If an agreement purporting to be a license or concession involves construction work by the licensee or concessionaire, it may constitute a contract for public work subject to competitive bidding (see, e.g., B.T. Skating Corp v County of Nassau, 204 AD2d 586, 612 NYS2d 199 lv den 85 NY2d 801, 624 NYS2d 371). Competitive bidding would be required if the agreement involves an indirect expenditure of public moneys, such as if the political subdivision will receive less revenue for the granting of the license or concession as a result of the licensee or concessionaire undertaking the construction work, and if the "total character" of the arrangement is that of a contract for public work and not a license or concession (cf. Citiwide, *supra*; B.C.I., *supra*).

8. Professional Services

There is a well-established exception to competitive bidding requirements for "professional services" (People ex rel. Smith v Flagg, 17 NY 584; see, gen., 15 ALR 3rd 733). The primary rationale for the exception is that "professional services" are not the type of "public work" which properly may be the subject of competition based solely on compliance with the objective, uniform standards of a bid specification, pursuant to a contract awarded to the lowest responsible bidder. Therefore, it would be an unreasonable construction of the term "public work" to apply it to those services (see People ex rel. Smith, *supra*; 2 Antieau on Local Government Law, Second Edition, §32.04[1][b]; 1991 Opns St Comp No. 91-34, p 101). The determination of whether the professional service exception is applicable in given situations must be made on a case-by-case basis, examining the particular services to be acquired (see, e.g., Schulz v Cobleskill-Richmondville Central School District, 197 AD2d 247, 610 NYS2d 694). In situations when there is no precedent, an analysis of factors cited by the courts in cases which discuss the exceptions can provide guidance, although the presence or absence of any one factor is not necessarily determinative (see 1986 Opns St Comp No. 86-25, p 41).

Generally, professional services involve specialized skill, training and expertise, use of professional judgment or discretion, and/or a high degree of creativity (see, e.g., Schulz v Cobleskill, *supra*; Schulz v Warren County, 179 AD2d 118, 581 NYS2d 885 lv den 80 NY2d 754, 587 NYS2d 906; Trane v Broome County, 76 AD2d 1015, 429 NYS2d 487; Hurd v Erie County, 34 AD2d 289, 310 NYS2d 953). In addition, although it has been held that the exception may apply, in proper circumstances, to contracts with a corporation, the services, in those instances, generally are to be performed by particular designated individuals (see Hurd v Erie County, 34 AD2d 289, 310 NYS2d 953; Horgan & Slattery v New York City, 114 App Div 555, 100 NYS 68). The courts also have noted that professional service contracts often involve a relationship of personal trust and confidence (see Opn No. 86-25, *supra*; Lynd v Heffernan, 286 App Div 597, 146 NYS2d 113 mot for lv granted 1 NY2d 641 mot to withdraw app granted 1

NY2d 919, 154 NYS2d 976).

The services of a physician, attorney and surveyor would fall within the exception (see People ex rel Smith, *supra*; 1993 Opns St Comp No. 93-3, p 5). The exception also has been extended by the courts to, among other things: technical services of an engineer engaged to prepare plans, maps and estimates (Vermeule v City of Corning, 186 App Div 206, 174 NYS 220, *affd* 230 NY 585; see also Olean v Cattaraugus County, 30 AD2d 758, 291 NYS2d 861); a management contract for a municipally-owned stadium (Hurd v Erie County, 34 AD2d 289, 310 NYS2d 953; compare City of New York v Beame, 37 AD2d 89, 322 NYS2d 503); placing of insurance coverage and services of an insurance broker (Lynd, *supra*; Surdell v City of Oswego, 91 Misc 2d 1041, 399 NYS2d 173)¹⁶; services of a court stenographer (see O'Brien v City of Niagara Falls, 65 Misc Rep 92, 119 NYS 497); preparation of plans and specifications by an architect (Horgan & Slattery v City of New York, 114 App Div 555, 100 NYS 68; People ex rel Kiehm v Board of Education, 198 App Div 476, 190 NYS 798 *mod on other grnds* 203 App Div 245, 196 NYS 789); installation of a noise-sensitive security system involving special skill in placing audio equipment and monitors (Doyle Alarm v Reville, 65 AD2d 916, 410 NYS2d 466); contracts to develop and implement marketing strategies to promote a municipality as a convention site (Schulz v Warren County, *supra*); contracts for the removal and disposal of contaminated soil (Vittengl v Congdon, 100 Misc 2d 40, 417 NYS2d 587); contracts for fire protection (Riley v Town of Halfmoon, 86 Misc 2d 114, 382 NYS2d 230); contracts for ambulance services (Amherst v Gross, 80 AD2d 719, 437 NYS2d 137); contracts for pharmaceutical services (Goldwin-Kent v Broome County, 107 Misc 2d 722, 435 NYS2d 1011)¹⁷; and services in connection with repairing a centrifugal air-conditioning unit where the "nature and magnitude of the necessary repairs required the special skill and expertise" of the manufacturer (Trane v Broome County, 76 AD2d 1015, 1016, 429 NYS2d 487, 488).¹⁸

In addition to the above applications of the exception by the courts, the State Comptroller's Office has expressed the opinion that the exception applies to, among other things: the services of a certified public accountant to conduct an audit (9 Opns St Comp, 1953, p 403); preparation of a tax map and appraisal of real property (10 Opns St Comp, 1954, p 335); preparation of a title abstract (1987 Opns St Comp No. 87-21, p 35; compare 1993 Opns St Comp No. 93-7, p 12, concluding that a contract for the service of process does not fall within the exception); investment advisory services (17 Opns St Comp, 1961, p 279); laboratory services for the examination of water and milk samples (16 Opns St Comp, 1960, p 361); certain services in connection with the conduct of an underground water survey (15 Opns St Comp, 1959, p 373); certain printing contracts where extensive writing, editing or art work is the predominant part of the contract and is inextricably integrated to the printing work (Opn No. 91-34, *supra*; 1982 Opns St Comp No. 82-146, p 185; 1980 Opns St Comp No. 80-287, p 86); and the services of a skilled programmer to develop customized software (1988 Opns St Comp No. 88-35, p 65).

It has also been held that a contract for computer services involving "[a]n extremely high degree of technical and scientific skill and knowledge" and the "inextricable integration" of those

skills "used in conjunction with electronic hardware and software" falls within the exception (American Totalisator Co. v WROTB, 44 AD2d 750, 751, 396 NYS2d 301, 302; see also Matter of Burroughs v NYSHESC, 91 AD2d 1078, 458 NYS2d 702 mot for lv to app den 58 NY2d 609, 462 NYS2d 1025). It is doubtful, however, that the exception would apply to contracts for relatively standardized, routine services which do not involve that degree of skill, knowledge or expertise generally present in contracts held to be included within the exception (1986 Opns St Comp No. 86-75, p 119; 1983 Opns St Comp No. 83-71, p 83; see McCardle v Board of Estimate, 74 Misc 2d 1014, 1017-8, 347 NYS2d 349, 353 affd 45 AD2d 822, 357 NYS2d 1009).

A potentially difficult question can arise when a transaction involves a hybrid of professional services and other services, or professional services and the acquisition of equipment (see McCardle, *supra*). In those situations, the exception may apply if: (1) the professional services component of the transaction is the primary or predominant part of the transaction; and (2) there is an "inextricable integration" of the professional services and the other component of the transaction (Opn No. 88-35, *supra*; Burroughs, *supra*; Pacificorp v City of New York, 741 F Supp 981)¹⁹.

9. Sole Source

~~It has been held that when the subject of a contract is controlled by a sole source so that there is no possibility of competition, the purposes of competitive bidding would not be furthered by inviting bids and, therefore, competitive bidding is not required (Harlem Gas v Mayor, 33 NY 309, 324-5; Williams v Bryant, 53 AD2d 229, 385 NYS2d 425; Gleason v Dalton, 28 AD 555, 51 NYS 337). The exception would be generally applicable only in limited circumstances when a municipality, in the public interest, requires particular goods or services which uniquely serve the public interest, for which there is no substantial equivalent and which are, in fact, available from only one source (see, e.g., Baird v Mayor, 96 NY 567; Tinson v City of New York, 36 Misc 2d 121, 231 NYS2d 899 mod 17 AD2d 311, 234 NYS2d 730 affd 13 NY2d 850, 242 NYS2d 490; 1991 Opns St Comp No. 91-34, p 101; 1988 Opns St Comp No. 88-35, p 65; 1986 Opns St Comp No. 86-25, p 41; 1983 Opns St Comp No. 83-105, p 129; 23 Opns St Comp, 1967, p 500; 18 Opns St Comp, 1962, p 43; 11 Opns St Comp, 1955, p 502; 10 McQuillin, Municipal Corporations, §29.34). The mere likelihood that only one firm will bid, however, is insufficient to justify a sole source procurement (1983 Opns St Comp No. 83-124, p 156). Further, a political subdivision may not artificially create a sole source situation such as by, without proper justification, tailoring bid specifications to limit competition to only one bidder (see Tinson, *supra*; Gerzof v Sweeney, 16 NY2d 206, 264 NYS2d 376; 1987 Opns St Comp No. 87-4, p 6; see also 1983 Opns St Comp No. 83-229, p 299).~~

~~In determining whether an item is required in the public interest, the political subdivision should show, at a minimum: the unique benefits to the political subdivision of the item as compared to other products available in the marketplace; that no other product provides substantially equivalent or similar benefits; and that, considering the benefits received, the cost~~

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Waiver)	
of the Decision of the)	
Universal Service Administrator by)	
)	
Adams County School District 14)	File Nos. SLD-425151, 425211, 425303,
Commerce City, Colorado, <i>et al.</i>)	425352, 426285, <i>et al.</i>
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: March 22, 2007

Released: March 28, 2007

By the Commission: Commissioner McDowell issuing a statement.

I. INTRODUCTION

1. In this Order, we grant requests by 66 schools and libraries (collectively, Petitioners) for review of decisions by the Universal Service Administrative Company (USAC) denying applications for discounted services under the schools and libraries universal service mechanism (also known as the E-rate program) on the grounds that they violated the Commission's requirement that a legally binding agreement be in place when the FCC Form 471 application is submitted.¹ We also grant six appeals from applicants whose funding commitments were reduced on the grounds that an existing contract expired without the applicant posting a new FCC Form 470 for services to be provided for the remainder of the funding year.² To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in Appendices A and B and issue an award or denial based upon a complete review and analysis no later than 90 days from the release of this Order.

II. BACKGROUND

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.³ Our rules provide that, with one limited exception for existing, binding contracts, an eligible school, library, or consortium that includes eligible schools or libraries must seek

¹ See Appendix A. In this Order, we use the term "appeals" to refer generically to requests for review of decisions, or to petitions for waivers related to such decisions, issued by the Commission, the Wireline Competition Bureau, or USAC. A list of these filings is attached in the Appendices and we will refer to all of these parties as Petitioners. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c).

² See Appendix B.

³ 47 C.F.R. §§ 54.502, 54.503.

competitive bids for all services eligible for support.⁴ In accordance with our rules, an applicant must file with USAC an FCC Form 470 requesting services.⁵ After the FCC Form 470 is posted to USAC's web site, the applicant must wait 28 days before entering into an agreement with a service provider for the requested services and submitting an FCC Form 471.⁶ Section 54.504(c) of our rules also states that the FCC Form 471 requesting support for the services ordered by the applicant shall be submitted "upon signing a contract for eligible services."⁷ Specifically, the instructions for FCC Form 471 state that applicants must have a "signed contract" or a "legally binding agreement" with the service provider "for all services" ordered on the FCC Form 471.⁸

3. There are two exceptions to this rule: non-contracted tariffed services and certain month-to-month services.⁹ If the services are month-to-month, applicants can instead submit copies of standard monthly bills as proof that they have binding, legal arrangements with service providers.¹⁰ In addition, applicants are instructed to indicate that such situations exist by filling in the abbreviation "MTM" in Item 15 of the FCC Form 471.¹¹

4. To ensure that applicants are in compliance with our competitive bidding rules, applicants must file a new FCC Form 470 when the existing contract ends.¹² When contracts expire at the end of the original term, the applicant must post a new FCC Form 470 for services provided beyond the contract expiration date.¹³ An applicant does not need to post a new FCC Form 470 each year when it has a multi-year contract or when exercising a contract's voluntary renewal provision if the applicant indicated that it was seeking a contract with those terms when it originally filed the FCC Form 470.¹⁴

5. Seventy-two Petitioners have requested a waiver of our rules or a review of USAC's decision to deny funding because they did not have a legally binding agreement in place when their FCC

⁴ 47 C.F.R. §§ 54.504, 54.511(c).

⁵ 47 C.F.R. § 54.504(b); *see also* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470).

⁶ 47 C.F.R. § 54.504(b)(4); *see also* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

⁷ 47 C.F.R. § 54.504(c); *see also* *Request for Review of Waldwick School District, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket No. 02-6, Order, 18 FCC Rcd 22994, 22995, para. 3 (Wireline Comp. Bur. 2003) (*Waldwick Order*); *Request for Review of St. Joseph High School, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 22499, 22500-01, para. 4 (Wireline Comp. Bur. 2002) (*St. Joseph Order*).

⁸ Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (FCC Form 471 Instructions) at 19.

⁹ *Id.* Applicants taking services from a filed tariff are not required to have a binding contract because the service is provided by the service provider to all parties at set rates and conditions.

¹⁰ *Id.* at 20.

¹¹ *Id.*

¹² *See* *Request for Review of New Albany-Floyd County Consolidated School Corporation, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-287615, CC Docket No. 02-6, Order, 20 FCC Rcd 8159, 8160-61, para. 5 (Wireline Comp. Bur. 2005) (*New Albany-Floyd County Order*).

¹³ *Id.* *See also* USAC website, Contract Guidance, <<http://www.sl.universalservice.org/reference/contract%5Fguidance.asp>> (retrieved Feb. 14, 2007).

¹⁴ *Id.*

Form 471 application was submitted or because their contract expired before the end of the funding year.¹⁵

III. DISCUSSION

6. In this item, we grant relief to 72 Petitioners seeking a reversal of USAC's decisions to deny their requests for universal service funding under the E-rate program. We grant a limited waiver of section 54.504(c) of our rules and remand the underlying applications associated with these appeals to USAC for further action consistent with this Order.¹⁶ To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in Appendices A and B and issue an award or denial based upon a complete review and analysis no later than 90 days from the release of this Order.

7. Petitioners' requests for universal service funding were denied either because they did not have a legally binding agreement in place when their FCC Form 471 application was submitted or because their contract expired before the end of the funding year. Some Petitioners claim that they could not or did not comply with our rules due to conflicting local or state procurement requirements.¹⁷ Other Petitioners claim that their employees erred or they misunderstood the rules.¹⁸ Other Petitioners claim that they technically followed program rules despite USAC's decision to the contrary.¹⁹

¹⁵ See 47 C.F.R. § 54.504(c). Although there is no specific provision in the Commission's rules that requires applicants to file a new Form 470 for services that extend beyond the contract expiration date, this principle is implicit in the program requirement that all services funded by the schools and libraries program be competitively bid. See 47 C.F.R. 54.504(a).

¹⁶ The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166.

¹⁷ See Request for Review of Adams County School District 14; Request for Waiver of Ballard County School District; Request for Review of Bullock County School District; Request for Review of Chesapeake Public Library System; Request for Review of Churchill County School District; Request for Review of District of Columbia Public Schools; Request for Review of Duluth Public Schools; Request for Review of Guam Department of Education; Request for Review of Holy Family School; Request for Review of Jefferson Parish School District; Request for Review of Merrimack Valley Library Consortium; Request for Review of Metropolitan Dayton Educational Cooperative Association; Request for Review of Missouri Research and Education Network; Request for Review of Monroe County Library System; Request for Review of Milwaukee Public Schools; Request for Review of Saddle Mountain Unified School District # 90; Request for Review of Saint Louis Special School District; Request for Review of Saint Paul Public Schools; Request for Review of San Diego Independent School System.

¹⁸ See Request for Review of Academie Cristo de los Milagros; Request for Review of Amesbury School District; Request for Review of Audre & Bernard Rapoport Academy; Request for Review of Bertie County School; Request for Review of Bourne Middle School; Request for Review of City of Baker School System; Request for Review of Christian Academy of Indiana; Request for Review of Compton Unified School District; Request for Review of Des Moines Public School; Request for Review of Eagle Ridge Academy; Request for Review of FCMA Immokalee Charter School; Request for Waiver of Fulton County School District; Request for Review of Hmong Academy; Request for Review of Information Referral Resource Assistance Independent School District; Request for Review of Institute for Learning Research, Inc.; Request for Review of Kingman Unified School District No. 20; Request

8. Based on the facts and the circumstances of these specific cases, we find that good cause exists to grant a limited waiver of section 54.504(c) of our rules for these Petitioners.²⁰ Competitive bidding requirements serve as a central tenet of the E-rate program. They ensure more efficient pricing for telecommunications and information services purchased by schools and libraries and help deter waste, fraud and abuse. Rigid adherence to the rule in these cases, however, does not further the purposes of the statutory goal mandated by Congress of preserving and advancing universal service for schools and libraries. Furthermore, we note granting these appeals should have minimal effect on the Universal Service Fund (USF or the Fund).²¹

9. The record demonstrates that although some Petitioners technically missed the program deadline for having a written contract in place, they were adhering to local or state procurement laws.²²

for Review of Lapeer District Library; Request for Review of Leland School District; Request for Review of Lincolnville Central School; Request for Review and/or Waiver of Lowell Joint Elementary School District; Request for Review of Nicholas County School District; Request for Review of North Clackamas School District 12; Request for Review of Our Lady Queen of Martyrs School; Request for Review of Parma City School District; Request for Review of RCMA Wimauma Charter School; Request for Review of Russell County Public Schools; Request for Review of Salisbury-Elk Lick School District; Request for Review of Sanborn Regional School District; Request for Review of St. Ignatius School; Request for Review of St. Leo Catholic Urban Academy; Request for Review of St. Matthias School; Request for Review of St. Rose Catholic Urban Academy; Request for Review of Upshur County School District; Request for Review of Wood County Educational Service Center.

¹⁹ See Request for Review of Aldar Academy; Request for Review of Andes Central School District; Request for Review of Beacon Academy; Request for Review of Campbell City Schools; Request for Review and/or Waiver of Cristo Rey New York High School; Request for Review of Fox Public Schools; Request for Review of Greater Newark Charter School; Request for Review of Kershaw County School District; Request for Review of Laredo Independent School District; Request for Review of Lexington County School District 1; Request for Review of Madison-Oneida BOCES; Request for Review of Mercedes Independent School District; Request for Review of Miami-Dade County Public Schools; Request for Review of Montgomery County School District; Request for Review of Richmond County School District; Request for Review of Southside Independent School District; Request for Review of Sunnyside Unified School District 12; Request for Review of United Talmudical Academy; Request for Review of Weatherly Area School District.

²⁰ 47 C.F.R. § 54.504(c). We also find good cause to waive the 28-day competitive bidding rule with respect to one funding request number (FRN) for the City of Baker School System (Baker). USAC denied funding for the FRN after finding that Baker awarded the contract before the 28-day period for posting its FCC Form 470 to USAC's website had expired. See 47 C.F.R. § 54.504(b)-(c). We find that Baker misunderstood the competitive bidding rules and did not repost an FCC Form 470 because it had a multi-year contract with its service provider. Because Baker did not indicate that its contract would be multi-year when it originally requested bids, it should have reposted an FCC Form 470 to allow all parties to bid on the contract. We find that, because this contractual agreement was already subject to the Commission's competitive bidding rules when it was first entered into, Baker should not be denied needed funding for these pre-existing contractual agreements and, thus, we waive section 54.504(b) of the Commission's rules in this instance. See 47 C.F.R. § 54.504(b).

²¹ We estimate that the appeals granted in this Order involve applications for approximately \$27.4 million in funding for Funding Years 2001-2006. We note that USAC has already reserved sufficient funds to address outstanding appeals. See, e.g., Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2007 (Jan. 31, 2007). Thus, we determine that the action we take today should have minimal impact on the Universal Service Fund as a whole.

²² See Request for Waiver of Ballard County School District; Request for Review of Bullock County School District; Request for Review of District of Columbia Public Schools; Request for Review of Duluth Public Schools; Request for Review of Guam Department of Education; Request for Review of Holy Family School; Request for Review of Institute for Learning Research, Inc.; Request for Review of Jefferson Parish School District; Request for Review of Madison-Oneida BOCES; Request for Review of Merrimack Valley Library Consortium; Request for Review of Metropolitan Dayton Educational Cooperative Association; Request for Review of Milwaukee Public

Others had to have their commitments with service providers approved by their governing boards or their agreements with service providers were contingent upon getting USAC's approval of funding before they could legally enter into the contract.²³ As a result, these Petitioners were unable to sign a legally binding agreement prior to filing their FCC Form 471 as required by section 54.504(c) of our rules.²⁴ Other Petitioners were denied needed funding because of ministerial mistakes.²⁵ For example, Academia Cristo de los Milagros mistakenly noted on its FCC Form 471 that its contract ended nine months before the end of the funding year, thus securing funding for only three months instead of the 12 it intended.²⁶ In another appeal, Compton Unified School District said it submitted the wrong contract to USAC, making it appear as though its FCC Form 471 was submitted before its contract was signed.²⁷ Although the Petitioners missed the deadline for evidencing a signed contract, they had legally binding contracts in place during the relevant funding years. Thus, all Petitioners had some form of an agreement with their service providers before submitting their FCC Forms 471. We find, therefore, that in these specific circumstances, a limited waiver of rule 54.504(c) is warranted.

10. These mistakes do not warrant the complete rejection of these Petitioners' applications for E-rate funding. Importantly, these appeals do not involve a misuse of funds. The Commission recently found in *Bishop Perry Middle School* that, under certain circumstances, rigid adherence to certain E-rate rules and requirements that are "procedural" in nature does not promote the goals of section 254 of

Schools; Request for Review of Missouri Research and Education Network; Request for Review of Saint Paul Public Schools; Request for Review of San Diego Independent School System. Although these schools had substantially completed their selection process for service providers, the contracts were not in place when the FCC Forms 471 were submitted because of additional steps required by state or local procurement laws.

²³ See Request for Review of Adams County School District 14; Request for Review of Chesapeake Public Library System; Request for Review of Churchill County School District; Request for Review of Fox Public Schools; Request for Review of Monroe County Library System; Request for Review of Saddle Mountain Unified School District # 90; Request for Review of Saint Louis Special School District.

²⁴ 47 C.F.R. § 54.504(c). While the dates vary each year, an FCC Form 471 filing window is typically open from early November to early February preceding the start of the funding year. See USAC website, Schools and Libraries Timetable and List of Deadlines, <<http://www.universalservice.org/sl/tools/calendar-reminders.aspx>> (retrieved Feb. 14, 2007).

²⁵ See Request for Review of Academie Cristo de los Milagros; Request for Review of Amesbury School District; Request for Review of Audre & Bernard Rapoport Academy; Request for Review of Bertie County School; Request for Review of Bourne Middle School; Request for Review of City of Baker School System; Request for Review of Campbell City Schools; Request for Review of Christian Academy of Indiana; Request for Review of Compton Unified School District; Request for Review of Des Moines Public School; Request for Review and/or Waiver of Cristo Rey New York High School; Request for Review of Eagle Ridge Academy; Request for Review of FCMA Immokalee Charter School; Request for Waiver of Fulton County School District; Request for Review of Hmong Academy; Request for Review of Information Referral Resource Assistance Independent School District; Request for Review of Kingman Unified School District No. 20; Request for Review of Lapeer District Library; Request for Review of Leland School District; Request for Review of Lincolnville Central School; Request for Review and/or Waiver of Lowell Joint Elementary School District; Request for Review of Miami-Dade County Public Schools; Request for Review of Nicholas County School District; Request for Review of North Clackamas School District 12; Request for Review of Our Lady Queen of Martyrs School; Request for Review of Parma City School District; Request for Review of RCMA Wimauma Charter School; Request for Review of Russell County Public Schools; Request for Review of Salisbury-Elk Lick School District; Request for Review of Sanborn Regional School District; Request for Review of St. Ignatius School; Request for Review of St. Leo Catholic Urban Academy; Request for Review of St. Matthias School; Request for Review of St. Rose Catholic Urban Academy; Request for Review of Upshur County School District; Request for Review of Wood County Educational Service Center.

²⁶ Request for Review of Request for Review of Academie Cristo de los Milagros.

²⁷ Request for Review of Compton Unified School District.

the Act – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore does not serve the public interest.²⁸

11. Consistent with precedent, we also grant the requests for review in instances where USAC denied funding solely because the execution date of the contract did not accompany the signature lines of both the applicant and the service provider.²⁹ We find in these instances that the Petitioners were denied funding by USAC only because the effective date of the contract was separate from the signature lines but that Petitioners had signed and dated contracts in place before the submission of their FCC Forms 471 and thus were in compliance with our rules.³⁰

12. In all of these cases, there is no evidence in the record that Petitioners engaged in activity to defraud or abuse the E-rate program. Finally, we find that, for these applicants, denying their requests for funding would create undue hardship and prevent these otherwise eligible schools and libraries from receiving E-rate funding. In some instances here we depart from prior Bureau precedent.³¹ For the reasons we describe, however, we find that the departure is warranted and in the public interest.

²⁸ See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, et al., CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5316-17, 5319-20, paras. 2, 9 (2006) (*Bishop Perry Middle School*). Moreover, as noted recently in *Bishop Perry Middle School*, many applicants contend that the application process is complicated and time-consuming, and the Commission has started a proceeding to address, among other things, modifying the application and competitive bidding process for the schools and libraries support mechanism. See *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Linkup, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, 03-109, CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, 11325, para. 40 (2005) (*Comprehensive Review NPRM*); *Bishop Perry Middle School*, 21 FCC Rcd at 5319-20, para. 9.

²⁹ See *Request for Review of a Decision of the Universal Service Administrator by Gayville-Volin School District 63-1, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-471545, CC Docket No. 02-6, Order, 21 FCC Rcd 9274 (Wireline Comp. Bur. 2006); *Request for Review of Richmond County School District, Schools and Libraries Universal Service Support Mechanisms*, File Nos. SLD-451211, 452514, 464649, CC Docket No. 02-6, Order, 21 FCC Rcd 6570 (Wireline Comp. Bur. 2006). To the extent state contract law does not require two signatures and two dates for a valid contract, Commission precedent does not impose such a requirement. We note that in detailing document retention requirements, the Commission required both beneficiaries and service providers to retain executed contracts that are “signed and dated by both parties.” *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15825, para. 48 (2004). We clarify that this language was not intended to establish a new rule regarding the validity of a contractual agreement.

³⁰ See *Request for Review of Aldar Academy*; *Request for Review of Andes Central School District*; *Request for Review of Beacon Academy*; *Request for Review of Greater Newark Charter School*; *Request for Review of Kershaw County School District*; *Request for Review of Laredo Independent School District*; *Request for Review of Lexington County School District I*; *Request for Review of Mercedes Independent School District*; *Request for Review of Montgomery County School District*; *Request for Review of Richmond County School District*; *Request for Review of Southside Independent School District*; *Request for Review of Sunnyside Unified School District 12*; *Request for Review of United Talmudical Academy*; *Request for Review of Weatherly Area School District*.

³¹ See, e.g., *New Albany-Floyd County Order*, 20 FCC Rcd at 8160-61, para. 5 (finding that applicant must repost FCC Form 470 when contract expires mid-funding year); *Waldwick Order*, 18 FCC Rcd at 22995, para. 3 (denying E-rate funding because applicant did not have signed, binding agreement with service provider); *St. Joseph Order*, 17 FCC Rcd at 22500-01, para. 4 (denying E-rate funding when applicant inadvertently told USAC it did not have a binding agreement even when, in fact, it did).

Accordingly, we find that good cause exists to grant Petitioners a limited waiver of our rules, and remand these matters to USAC for further processing consistent with our decision.³²

13. To assist applicants in successfully applying for funding, we direct USAC to increase its outreach and educational efforts to inform applicants about the program's application requirements in an attempt to reduce these types of errors. We expect that the additional outreach and educational efforts will better assist E-rate applicants in meeting the program's requirements and increase awareness of the filing rules and procedures. As we noted above, we believe that these changes will improve the overall efficiency of the E-rate program and reduce the occurrence of circumstances justifying waivers such as those granted above.

14. We emphasize the limited nature of this decision. As stated above, our competitive bidding rules are important to ensure more efficient pricing for telecommunications and information services purchased by schools and libraries. Although we grant the subject appeals before us, our action here does not eliminate the rule that applicants have a signed contract in place when submitting an FCC Form 471. In addition, we continue to require E-rate applicants to submit complete and accurate contract information to USAC in a timely fashion as part of the application review process.

15. Finally, we are committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the appeals addressed here, this action in no way affects the authority of the Commission or USAC to conduct audits and investigations to determine compliance with the E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or our rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the Requests for Review and Requests for Waiver filed by the Petitioners as listed in Appendices A and B ARE GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this Order.

³² We also reverse USAC's denial of funding to District of Columbia Public Schools (District of Columbia) on the ground that the applicant's funding requests included 30 percent or more of unsubstantiated amounts of eligible services. As we recently held in the *Iroquois Order*, the 30 percent rule applies to requests for ineligible services, not for unsubstantiated amounts of eligible services. *Request for Review by Iroquois West School District 10, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-343292, CC Docket No. 02-6, Order, 20 FCC Rcd 540 (Wireline Comp. Bur. 2005) (*Iroquois Order*); 47 C.F.R. § 54.504(d). We therefore direct USAC to fund the previously denied application, if the application is otherwise in conformity with our rules, but to reduce the District of Columbia's funding by the amount of the costs that cannot be substantiated.

17. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that section 54.504(c) of the Commission's rules, 47 C.F.R. § 54.504(c), IS WAIVED to the limited extent described herein.

18. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, USAC SHALL COMPLETE its review of each remanded application listed in Appendices A and B and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from release of this Order.

19. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary